

future date by which the operator must be able to meet the new standards.

2. Law

The 1992 Cable Act requires the agreement of the cable operator to impose customer service standards which exceed the national benchmark. To allow a franchising authority to unilaterally impose standards would nullify three other provisions of the Cable Act.

First, Section 632 directs the Commission to "establish standards by which cable operators may fulfill their customer service requirements." 47 U.S.C. § 552(b) (1992 amendment) (emphasis added). Operators would be unable to "fulfill" their obligations using the FCC standards if a franchising authority were free to set goals unilaterally in excess of FCC standards. See, e.g., 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 at 119-126 (Sands 4th ed. 1992) (every word, clause and sentence should be given effect, so that no term is inoperative or superfluous) (and cases there cited).

Second, the statute declares that: "[n]othing in this section shall be construed to prevent a franchising authority and a cable operator from agreeing to customer service requirements that exceed" the FCC standards. 47 U.S.C. § 542(c)(2) (emphasis added). The requirement that parties must agree upon additional standards would be a nullity if the franchising authority had the unabridged discretion to impose standards beyond the FCC's.

Third, and most glaringly, the standards for franchise renewal would be erased as to customer service requirements if the franchising authority were allowed to impose whatever standards it deemed appropriate.^{1/} Section 626 of the Cable Act generally entitles an operator to renewal if: (1) it has substantially complied with material franchise terms; (2) its service (including response to consumer complaints and billing practices) "has been reasonable" in light of community needs; (3) the operator is financially, legally and technically qualified; and (4) "the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c). This standard for renewal is intended to eliminate the "blue sky" franchise requirements of the franchise wars, and to tie franchising obligations to what is needed and cost-justified. See, e.g., H.R. Rep. No. 934, 98th Cong., 2d Sess. at 74 (House Report to 1984 Cable Act) ("[I]n assessing costs under this [renewal] criteria, the operator's ability to earn a fair rate of

^{1/} Although the Conference Report to the 1992 Cable Act contains a suggestion that customer service standards might be imposed as part of a franchise modification or transfer, the text of the statute, which allows a cable operator to "fulfill" its obligations using the FCC standards, to "agree" upon more demanding standards, and which ties customer service requirements to renewal, cannot be reconciled with this suggestion. The statutory language and structure must take precedence over such inconsistent legislative history. See, e.g., ACLU v. FCC, 823 F.2d 1554, 1567-69 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

return on its investment and the impact of such costs on subscriber rates are important considerations."). The customer service provisions of the 1992 Cable Act must be construed in harmony with these statutory renewal procedures and standards. See, e.g., 2A Singer, Sutherland Statutory Construction § 46.05 ("[E]ach part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole").

In practice, as part of the renewal process, the franchising authority and cable operator each review the operator's customer service during the expiring franchise term, ascertain community needs for the future, and negotiate a franchise that usually incorporates those requirements that will not create undue pressure on subscriber rates or services. If franchising authorities are free to impose a "wish list" of customer service standards before renewal, then the prophylactic effect of the Cable Act renewal standards will be lost. Subscriber rates would be exposed to unwarranted cost pressure, and "the operator's ability to earn a fair rate of return on its investment" would be undermined by the unrestricted discretion of the franchising authority. Congress could not have intended this result by enacting the customer service provisions. Absent explicit statutory language removing customer service requirements from renewal proceedings, a franchising authority should not be permitted to alter a franchise agreement unilaterally before renewal.^{2/}

^{2/} New York Cable Television Ass'n, Inc. v. Finneran, 954 F.2d 91 (2d Cir. 1992), which some read to the contrary, is in

[Footnote Continued Next Page]

3. Laws of General Applicability

Those passages of Section 8 which preserve the right of franchising authorities and states to pass customer service and consumer protection measures simply affirm the power to pass laws of general applicability. The final sentence of subsection 8(c)(2) declares that:

Nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

Subsection 8(c)(1) similarly permits state and local franchising authorities to pass consumer protection laws. Unless read in the context of the rest of Section 8, these provisions would contradict those earlier provisions of the section which allow a cable operator (1) to "fulfill" its customer service obligations under

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conflict with Housatonic Cable Vision Co. v. Department of Public Utility Control, 622 F. Supp. 798, 809 (D. Conn. 1985) (court noted that "the Cable Act establishes procedural standards that limit the ability of a franchising authority to establish or alter the terms of its agreement with a cable operator"), and with limits in the 1984 Act on unilateral amendments. E.g. H.R. Rep. No. 934, 98th Cong. 2d Sess. at 94 (1984) ("For example, [if] after the effective date of this Act, a state enacts a statute requiring a new PEG channel, that provision may only be phased in as each franchise comes up for renewal."). In any event, Finneran is inconsistent with a fair reading of the 1992 amendments to the Cable Act.

the federal standards, and (2) to agree to more stringent requirements, and would likewise render null the standards for renewal that tie customer service to cost-justified community needs and interests. In light of these co-equal statutory provisions, sub-section 8(c)(1) and the final sentence of subsection 8(c)(2) must be read to permit state and local laws of general applicability (like trade regulation) to establish customer service requirements for all businesses, including cable, in a nondiscriminatory manner.

C. Consensual Franchise Provisions Are Grandfathered Until Renewal

This same rationale requires the Commission to conclude that consensual customer service standards contained in existing franchises are grandfathered.^{3/} If a franchising authority is allowed to superimpose new customer service obligations unilaterally outside of the renewal process, there is no mechanism that will either protect the investment of cable operators or prevent unjustified rate pressure on subscribers. The statutory renewal

^{3/} The Contract Clause of Article I, Section 10 of the United States Constitution prohibits any state "law impairing the obligation of contracts," and would constitutionally prohibit a local government from unilaterally imposing new customer service requirements on a franchised cable operator. See, e.g., 5 E. McQuillen, The Law of Municipal Corporations § 19.44 at 652-53 (3d ed. 1989) (general rule is that a city or county that enters a contract may not, "by ordinance or otherwise, impose additional burdens on the grantee or vary the conditions contained in the contract."); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-13 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-47 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 17-23 (1977).

standards require the franchising authority to view customer service as part of the overall community needs and interests that are cost-effective, not as an independent regulatory matter.

The NPRM expresses a concern that Congress' goal of timeliness in customer service might be hindered unless franchising authorities may amend the franchise agreement before renewal. NPRM ¶ 7 n. 11. This concern is without foundation: the bulk of cable television franchises issued in the mid-1970s through the early 1980s are coming up for renewal in the next few years. Most franchises (covering the vast majority of subscribers) were awarded during the "franchise wars," and were set for 15 year periods now expiring. See, e.g., Cities Get More Assertive On Franchise Renewals, MultiChannel News, Jan. 13, 1992 (p.3, 34) ("More franchises than ever are entering the 36-month Cable Act renewal window, including large urban and suburban franchises negotiated in the late 1970's and early 1980's"); Cable Franchise Wars, Cable World, Jan. 7, 1991 (P.1, 32) ("Most of the country's cities granted cable franchises in the '70s and early '80s, many as 15-year contracts dictated by a Federal Communications Commission rule in effect from 1972-1977 that limited franchise terms to that timespan."). As these franchise renewals come up for negotiation, the cable operator and the local franchising authority will carefully review each area of customer service and arrive at a set of standards that meet the community needs.

Recently renewed franchises also pose no threat to Congress' desire for increased customer satisfaction. Franchises that have been renewed in the past five years most likely include customer service standards tailored to that community. For example, renewal franchises granted from 1989 through 1992 to systems owned by Western Communications in Camarillo, Fillmore, Moorpark and Westlake Village, California all incorporate customer service standards in such areas as telephone and office availability, service for installations, interruptions and repairs, billing, record keeping and reporting, and subscriber notifications. A 1992 renewal franchise granted to TeleCable's system in Lexington-Fayette County, Kentucky incorporated customer service standards that track areas specified in the NCTA model. These communities and others, which have recently analyzed the customer service needs of their communities and incorporated appropriate standards in renewal franchises, should not have to revisit the issue as a result of the 1992 Cable Act. Communities and cable operators would, of course, be permitted to modify existing franchise terms through mutual agreement to account for the new federal customer service standards.

**D. A Franchising Authority May Agree With The
Operator To Incorporate Customer Service
Requirements Less Stringent Than FCC Standards**

The FCC standards may be adopted, as modified to meet community needs, into new and renewal franchises. In order to accommodate the various different needs of a specific community, however, the franchising authority and operator must be allowed to adopt standards less stringent than those set by the FCC. If a local government and cable operator agree, for example, that customers have been satisfied with the operator's existing service, they should be free to incorporate that level of service into the franchise if they so desire. When subscribers are satisfied with a level of service below a national benchmark, it would undermine the goals of Congress in passing this provision if subscribers were forced to pay for additional customer service resources needed to meet a federal standard.

For example, Grassroots Cable Systems serves approximately 6,000 subscribers in 20 different isolated rural cable systems in Maine and New Hampshire. The company's service technicians schedule one day each week to perform installation and service calls in a particular system, covering a set "circuit" of systems each week. These rural subscribers do not complain when told that they must await the next scheduled day for service in their system, and instead give the company good marks for customer service. Grassroots' subscribers understand that it would be impossible for a cable operator to staff each small rural

system with more permanent technicians to insure service within 36 hours or some similar period. If the subscribers are satisfied, there is no need for Grassroots to attempt to meet more stringent service standards that might require greater costs than the operator can reasonably be expected to recover.

E. The FCC Should Prevent Excessive Enforcement Action

1. Right of Cure

Before any cable operator is subject to pay compensation for violations of the customer service standards, the operator must have an initial chance to implement the standards, as well as an opportunity to cure perceived defects. The NCTA standards require frequent monitoring of compliance with the quantitative standards by the cable operator, just as the FCC's CLI rules require periodic testing. Just as the CLI rules permit an operator to correct deficiencies without penalty, so too should the FCC's customer service standards grant cable operators an incentive to monitor themselves and correct irregularities.

2. No Punitive Remedies

If the cities are to enforce the customer service standards, however, the type of enforcement permissible should be the power to ensure that the standards are implemented, and the power to compensate subscribers for a cable operator's failure to meet the local standards. The franchising authority should not be permitted to impose penalties upon the cable operator through levies unrelated to actual loss by subscribers. Just as

provisions for unreasonably large liquidated damages in contracts are void as penalties disfavored by the law, see, e.g., UCC Art. II § 2-718; Restatement (Second) Contracts § 356(1) (1981), a cable operator should not be subject to an unreasonable penalty for failure to meet customer service standards.

Even a modest liquidated damages provision can operate as a penalty if the violation applies to all subscribers (e.g. system outage) and/or so-called "continuing violations". For example, in recent litigation under the privacy provision of the Cable Act, 47 U.S.C. § 551, a class action on behalf of the 198,000 subscribers to the Kansas City system sought liquidated damages alternatively for \$198 million (\$1,000 per violation x 198,000) or more than \$26.7 billion (\$100 per day for an alleged violation continuing for 1,352 days, times 198,000). See Wilson v. American Cablevision of Kansas City, Inc., No.

88-1259-CV-W-JWO-3 (W.D Mo., May 29, 1990) at n. 11. Rigid liquidated damages provisions which presume injury for minor violations clearly are not geared toward the best interests of subscribers, and could threaten the viability of both large and small systems.

F. Small System Exemption

The NCTA's present standards recognize that systematic measurement of customer service should not be expected in certain systems with fewer than 10,000 subscribers. We do not believe that it is possible to frame blanket exemptions from all service

obligations for systems below a certain size. The variations in existing system design, subscriber demographics, and subscriber density create variations too numerous to exempt or not exempt a system from a particular standard on the basis of size alone. However, the standards themselves must be applied with sensitivity to the cost burdens involved. The Commission should state that smaller systems may be less able to comply with all of the standards, and should urge franchising authorities to take into account the size of systems when developing and applying customer service standards.

IV. CONCLUSION

NCTA believes that its customer service standards, with annotations, provide a workable model for a national benchmark of customer service standards that incorporates the flexibility necessary to allow each community to tailor the standards to local needs and cost justification. The NCTA recommends that the FCC adopt the annotated NCTA standards as the national benchmark by which a cable operator may fulfill its customer service requirements.

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